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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5969

EDDIE LEE MILLER, Petitioner,

V.

STATE OF ARKANSAS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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BY FAILING TO CONSTRUE THE MEANING OF THE STATUTORY AGGRAVATING CIRCUMSTANCES INVOLVED HEREIN, INSTEAD LEAVING THAT INTERPRETATION TO THE SHEER SPECULATION OF AN UNINSTRUCTED JURY, AND BY AFFIRMING THE JURY'S FINDINGS IN THAT REGARD ON LESS THAN SUBSTANTIAL EVIDENCE, THE SUPREME COURT OF ARKANSAS DEPARTED FROM PRIOR PRECEDENT AND FAILED TO FULFILL ITS OBLIGATION UNDER STATE LAW TO INDEPENDENTLY ASSESS THE EVIDENCE OF RECORD TO DETERMINE THAT SUCH EVIDENCE SUPPORTS THE JURY'S FINDING OF AN AGGRAVATING CIRCUMSTANCE WITH THE RESULT THAT THE ARKANSAS SENTENCING PROCEDURES CREATE A SUBSTANTIAL RISK THAT THE PUNISHMENT OF DEATH WILL BE INFLICTED IN AN ARBITRARY AND CAPRICIOUS MANNER BECAUSE:

A. THE JURY IS GIVEN NO GUIDANCE CONCERNING THE MEANING OF A GIVEN STATUTORY CIRCUMSTANCE; AND

B. BY DEFERRING TO THE JURY'S INTERPRETATION OF THE MEANING OF THE STATUTORY AGGRAVATING CIRCUMSTANCES AND AFFIRMING ITS FINDING ON LESS THAN SUBSTANTIAL EVIDENCE, RATIONAL AND MEANINGFUL REVIEW OF THE SENTENCING PROCESS IS IMPOSSIBLE AND THERE IS NO MEANINGFUL BASIS FOR DISTINGUISHING THE FEW CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THE MANY IN WHICH IT IS NOT; AND

C. BY DEFERRING TO THE JURY'S INTERPRETATION OF THE MEANING OF THE STATUTORY AGGRAVATING CIRCUMSTANCES AND AFFIRMING A JURY'S FINDING ON LESS THAN SUBSTANTIAL EVIDENCE, THE SUPREME COURT OF ARKANSAS IN THE PRESENT CASE EFFECTIVELY ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE AGGRAVATING CIRCUMSTANCES HERE INVOLVED AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

The petitioner, Eddie Lee Miller, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on October 6, 1980.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is unofficially reported at 270 Ark. 341, ____ S.W.2d ____ (October 6, 1980) and copies of the majority and dissenting opinions appear in the Appendix hereto.

JURISDICTION

The initial opinion of the Supreme Court of Arkansas was filed on June 23, 1980. A timely petition for rehearing was denied and a substitute opinion entered on October 6, 1980. Thereafter, petitioner sought a recall of the mandate in order to petition this Court for a writ of certiorari, which was granted on November 24, 1980. An application for order extending the time for filing this petition for writ of certiorari has been filed on December 8, 1980, and an extension granted until January 4, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3), petitioner asserting here and having asserted below a deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

1. Whether in affirming the imposition of the sentence of death in the present case and affirming the jury's findings regarding aggravating circumstances on less than substantial evidence by deferring to the jury's uninformed interpretation of the meaning of those aggravating circumstances, the Arkansas Supreme Court has effectively adopted such a broad and vague construction of the aggravating circumstances involved as to violate the Eighth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions (quoted in relevant part only).

1. The Eighth and Fourteenth Amendments to the Constitution of the United States.

2. Act 280 of 1975, Sections 1501 and 1301 et seq., passed by the Arkansas legislature with an effective date of January 1, 1976, and codified as Ark. Stat. Ann. §41-1501 (Repl. 1977) and Ark. Stat. Ann. §41-1301, et seq. (Repl. 1977).

§41-1501. Capital murder. - (1) a person commits capital murder if: (a) acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.

§41-1301. Trial of persons charged with capital murder. - The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital

offense charged, but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302 [§41-1302]; except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 [§41-1303], or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in section 1303 [§41-1303] shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing. [Acts 1975, No. 280, §1301, p. 500.]

§41-1302. Findings required for death sentence - Unanimity required. -

(1) The jury shall impose a sentence of death if it unanimously returns written findings that:

(a) aggravating circumstances exist beyond a reasonable doubt; and

(b) aggravating circumstances outweight [outweigh] beyond a reasonable doubt all mititgating circumstances found to exist; and

(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(2) The jury shall impose a sentence of life imprisonment

without parole if it finds that:

(a) aggravating circumstances do not exist beyond a reasonable doubt; or

(b) aggravating circumstances do not outweight [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; or

(c) aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(3) If the jury does not make all findings required by subsection (1), the court shall impose a sentence of life imprisonment without parole. [Acts 1975, No. 280, §1302, p. 500; 1977, No. 474, §11, p. --.]

§41-1303. Aggravating circumstances. - Aggravating circumstances shall be limited to the following:

(1) the capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) the capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) the person previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person;

(4) the person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

(5) the capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) the capital murder was committed for pecuniary gain; or

(7) the capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function. [Acts 1975, No. 280, §1303, p. 500; 1977, No. 474, §12, p. --.]

§41-1304. Mitigating circumstances. - Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) the youth of the defendant at the time of the commission of the capital murder;

(5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) the defendant has no significant history of prior criminal activity. [Acts 1975, No. 280, §1304, p. 500.]

STATEMENT OF THE CASE

Petitioner Eddie Lee Miller was arrested with a warrant on the afternoon of November 3, 1978, at his home. He was charged by amended felony information filed December 21, 1978, with capital felony murder in violation of Ark. Stat. Ann. §41-1501(1) (a) (Repl. 1977). Specifically, the information alleged that petitioner, a black resident of Blytheville, Arkansas, killed W. F. Bolin, a white Blytheville businessman, during the perpetration of a robbery.

Petitioner's motion to suppress evidence seized from his home pursuant to a warrant was denied by the trial court, as was petitioner's motion to suppress statements allegedly made by him after being confronted with the evidence seized. Trial by jury ensued on February 12, 1979, and concluded on February 16, 1979, the jury finding petitioner guilty as charged and sentencing him to death by electrocution.

The circumstances of the crime were essentially established by petitioner's confessions. They disclose that on the morning of November 3, 1978, petitioner went to the store of W. F.

Bolin. Petitioner indicated he wanted to buy an article and filled out a purchase contract using a fictitious name and address. Petitioner then inquired about a motor and accompanied Bolin to the back of the store. Petitioner then ordered Bolin to sit on the floor. When Bolin appeared to reach for something, petitioner fired four shots emptying his pistol and killing Mr. Bolin. (T. 496, 497, 679, 680). During petitioner's interrogation, he was asked what he intended to do when he ordered Bolin to sit on the floor. Petitioner stated he just intended to get the money and go. When asked if he was just going to leave Bolin sitting there, petitioner responded:

> "And just leave him or just leave him just sitting there, you know, and by the time I got out the door I knowed he was going to call the police or something, you know, and I'd been, you know gone and it be:n at least, you know, you'd been described, you know, I know I probably got described but it probably the first time he'd seen me in there. And I was just going to take my chances, you know, or just, you know, get the money and just go on, you know. (T. 688, 689)

After firing the shots, petitioner emptied the metal cash box. At that time the proprietor of the business next door, Jim Hudson, entered the side door. Petitioner ordered Hudson into the store but Hudson backed out the door. (T. 497, 498) When Hudson walked in, petitioner was holding the metal cash box in front of him with both hands. Petitioner's fingers were underneath the box and his thumbs encircled the top. There was no gun drawn or observed at that time. Hudson backed out the door when petitioner ordered him inside. (T. 552-554) Hudson waited outside the building not sure whether petitioner would exit the front or side door. Petitioner came out the side door and turned to go down the alley away from Hudson. Petitioner had a gun in his hand, held down to his side. As petitioner went down the alley away from Hudson, he apparently stuck the gun in his belt and then began to run. (T. 554, 555)

At the sentencing phase of the trial, the state introduced evidence of petitioner's prior convictions. In arguing that the death penalty was appropriate in the instant case, the state asserted the murder was committed for pecuniary gain, (T. 884) to

prevent arrest, (T. 889, 890) and pointed out the fact petitioner had previously been convicted of felonies involving a threat of violence. (T. 891, 892) Additionally the state emphasized the extreme cost and burden put on taxpayers to incarcerate a man for life (T. 886, 887) and that the jury would be taking a terrific risk in sentencing petitioner to life imprisonment because he might escape. The state concluded that petitoner was a mad dog and like a mad dog, should be put to death. (T. 893-895)

After deliberation, the jury imposed a sentence of death, having found no mitigating circumstances and four aggravating circumstances. The jury concluded the aggravating circumstances justified beyond a reasonable doubt imposition of the sentence of death. The four aggravating circumstances the jury found to exist were:

> I. The defendant had, beyond a reasonable doubt, previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.
>
> II. The defendant did, beyond a reasonable doubt, in the commission of the capital felony murder knowingly create a great risk of death to a person other than the victim.
>
> III. The defendant did, beyond a reasonable doubt, commit the capital felony murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody.
>
> IV. The defendant did, beyond a reasonable doubt, commit the capital felony murder for pecuniary gain.

Petitioner appealed directly to the Supreme Court of Arkansas, asserting, inter alia, that there was no substantial evidence to support the jury's finding on aggravating circumstances, when those circumstances were properly construed. In a four to three decision, the Arkansas Supreme Court affirmed, finding the Arkansas death penalty statute was constitutionally applied in this case.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner's question arises from his contentions in the Arkansas Supreme Court that the Arkansas death penalty statute was unconstitutional under the Eighth and Fourteenth Amendments

to the Constitution of the United States due to inadequate appellate review of the sentencing procedure and because as properly construed, there was insufficient evidence to support the jury's findings on aggravating circumstances, thereby invalidating the sentence of death. These contentions were considered and rejected by the Arkansas Supreme Court.

REASON FOR GRANTING THE WRIT

BY FAILING TO CONSTRUE THE MEANING OF THE STATUTORY AGGRAVATING CIRCUMSTANCES INVOLVED HEREIN, INSTEAD LEAVING THAT INTERPRETATION TO THE SHEER SPECULATION OF AN UNINSTRUCTED JURY, AND BY AFFIRMING THE JURY'S FINDINGS IN THAT REGARD ON LESS THAN SUBSTANTIAL EVIDENCE, THE SUPREME COURT OF ARKANSAS DEPARTED FROM PRIOR PRECEDENT AND FAILED TO FULFILL ITS OBLIGATION UNDER STATE LAW TO INDEPENDENTLY ASSESS THE EVIDENCE OF RECORD TO DETERMINE THAT SUCH EVIDENCE SUPPORTS THE JURY'S FINDING OF AN AGGRAVATING CIRCUMSTANCE WITH THE RESULT THAT THE ARKANSAS SENTENCING PROCEDURES CREATE A SUBSTANTIAL RISK THAT THE PUNISHMENT OF DEATH WILL BE INFLICTED IN AN ARBITRARY AND CAPRICIOUS MANNER BECAUSE:

A. THE JURY IS GIVEN NO GUIDANCE CONCERNING THE MEANING OF A GIVEN STATUTORY CIRCUMSTANCE; AND

B. BY DEFERRING TO THE JURY'S INTERPRETATION OF THE MEANING OF THE STATUTORY AGGRAVATING CIRCUMSTANCES AND AFFIRMING ITS FINDING ON LESS THAN SUBSTANTIAL EVIDENCE, RATIONAL AND MEANINGFUL REVIEW OF THE SENTENCING PROCESS IS IMPOSSIBLE AND THERE IS NO MEANINGFUL BASIS FOR DISTINGUISHING THE FEW CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THE MANY IN WHICH IT IS NOT; AND

C. BY DEFERRING TO THE JURY'S INTERPRETATION OF THE MEANING OF THE STATUTORY AGGRAVATING CIRCUMSTANCES AND AFFIRMING A JURY'S FINDING ON LESS THAN SUBSTANTIAL EVIDENCE, THE SUPREME COURT OF ARKANSAS IN THE PRESENT CASE EFFECTIVELY ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE AGGRAVATING CIRCUMSTANCES HERE INVOLVED AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner Eddie Lee Miller was sentenced by jury to die in the electric chair. Before a sentence of death may be imposed under Arkansas law, the jury must unanimously find that:

1. aggravating circumstances exist beyond a reasonable doubt; and

2. aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

3. aggravating circumstances justify a sentence of death beyond a reasonable doubt.

Ark. Stat. Ann. §41-1302 (Repl. 1977). In the instant case, the jury determined that four aggravating circumstances existed but no mitigating circumstances. The jury concluded the aggravating circumstances justified a sentence of death.

Specifically, the jury indicated the following statutory aggravating circumstances existed beyond a reasonable doubt:

> I. The defendant had, beyond a reasonable doubt, previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.
>
> II. The defendant did, beyond a reasonable doubt, in the commission of the capital felony murder knowingly create a great risk of death to a person other than the victim.
>
> III. The defendant did, beyond a reasonable doubt, commit the capital felony murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody.
>
> IV. The defendant did, beyond a reasonable doubt, commit the capital felony murder for pecuniary gain.

On appeal, petitioner asserted, inter alia, that the jury's findings with regard to the existence of aggravating circumstances II and III were completely unsupported by the evidence and could not be sustained under any rational interpretation of the meaning of those statutory circumstances. The Supreme Court of Arkansas affirmed, but did not determine if there was substantial evidence to support the jury's findings. Rather, the court stated it did not consider the jury's findings on aggravating circumstances to be "separate little verdicts" which must be supported by substantial evidence to be sustained on appeal. (Appendix A, p. 10) The court stated that although it might have interpreted the meaning of the statutory aggravating circumstances differently than the jury did in this case, it would not set the jury's findings aside because the jury, being untrained in the law, could sincerely and honestly have made the findings it did based upon the evidence presented and its unguided understanding of what the statutory aggravating circumstances meant. (Appendix A, pp. 10, 11) In short, the court adopted a good faith test for review of the jury's findings on aggravation and abandoned the substantial evidence test, approving a jury finding on less than substantial evidence so long as the jury acted sincerely and as best they could.

Three justices dissented, finding insufficient evidence to

support the jury's findings with regard to one or both of the contested aggravating circumstances. (Appendices B & C). The Chief Justice dissented on the additional ground that the majority's newly announced standard for review of the jury's findings on aggravating circumstances was actually no review and certainly not the meaningful review required for a constitutionally imposed penalty of death. The problem with the standard of review adopted by the majority in this case was succinctly pointed out by the Chief Justice:

> I cannot accept the approach of the majority in its substituted opinion that somehow we should not require the same test for substantial evidence to sustain a jury finding of an aggravating circumstance, on which the infliction of the death penalty may hinge, just because 12 average citizens, untrained in the law, perhaps confused by the submission of an aggravating circumstance for which there was no basis, did the best they could but still "deliberately and conscientiously" agreed upon a wrong answer in making a sincere and honest finding "as they understood it."

(Appendix B, p. 2)

In Arkansas, the test for review of a jury's findings of fact is and always has been whether the finding is supported by substantial evidence, which has been defined as "evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred." Jones v. State, 269 Ark. 119, ____ S. 2d ____ (May 27, 1980). Even where a jury enters a verdict rejecting the affirmative defense of insanity, which a defendant must prove only by a preponderance of the evidence, the issue on appeal is whether there is any substantial evidence to support the jury's rejection of the defense. Gruzen v. State, 267 Ark. 380, ____ S.W.2d ____ (December 17, 1979). "Any" evidence is not substantial evidence; substantial evidence is valid, legal and persuasive evidence which does more than create a suspicion of the fact to be established. Pickens-Bond Const. Co. v. Case, 266 Ark. 323, 584 S.W.2d 21 (1979).

Here there was no substantial evidence presented to support the jury's findings on aggravating circumstances II and III, as those circumstances have been previously construed by the Arkansas Supreme Court. Hulsey v. State, 261 Ark. 449, 549

S.W.2d 73 (1977), cert. denied, 439 U.S. 882 (1978) (great risk of death to another); Pickens v. State, 261 Ark. 756, 551 S.W.2d 212, cert. denied, 435 U.S. 909 (1977) (great risk of death to another); Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978) (great risk of death to another and avoiding or preventing an arrest); Westbrook v. State, 265 Ark. 736, 580 S.W.2d 702 (1979) (avoiding or preventing an arrest). In three of the cited cases, the court affirmed the jury's finding that the defendant created a great risk of death to a person other than the victim because the evidence demonstrated that shots were actually fired directly at or toward other persons or the defendant actually pointed a loaded gun at other persons and threatened to shoot if they did not leave. Similarly, with regard to the circumstance that the defendant committed the murder to avoid or prevent an arrest, jury findings in that regard were affirmed in Swindler v. State, supra, and Westbrook v. State, supra, where the evidence showed that officers were killed either while attempting to arrest the defendant or while attempting to check the defendant out pursuant to a warrant for unlawful flight. Here there was no evidence that petitioner ever even pointed his then unloaded pistol at anyone or that there was even any attempted arrest or effort to avoid such an attempt.

In the present case, it is highly significant that neither the majority nor the dissenters found the jury's findings on both contested circumstances to be supported by substantial evidence. Where there is insufficient evidence to support the jury's finding of any statutory aggravating circumstance, the sentence should be reduced to life imprisonment without parole or a new trial ordered. Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 977 (1977). By affirming the jury's findings on aggravating circumstances on less than substantial evidence and according to the court's speculation on how the jury may have construed their meaning, the Arkansas Supreme Court has abandoned any meaningful standard of review and approved a procedure which allows unguided juries the unrestrained authority to

give such varying, broad and vague constructions to the statutory aggravating circumstances as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

In Furman v. Georgia, 408 U.S. 238 (1972), this Court established the basic principle that the penalty of death cannot be imposed under sentencing procedures that create a substantial risk that the punishment of death will be inflicted in an arbitrary and capricious manner. A capital sentencing scheme must provide a meaningful basis for distinguising the few cases in which the penalty of death is imposed from the many cases in which it is not. Godfrey v. Georgia, 446 U.S. ____, 100 S. Ct. 1759, 64 L.ED.2d 398 (1980). The concerns expressed in Furman can be met, facially, by a narrowly drawn statute which suitably directs and limits the jury's discretion so as to minimize the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Collins v. State, supra.

However, because juries have little experience in sentencing and are unlikely to be skilled in dealing with the information given them; and because statutory aggravating circumstances are necessarily somewhat general; there is always a possibility of arbitrariness and capriciousness in a jury's verdict. Thus, the further safeguard of meaningful appellate review is necessary to ensure that death sentences are not imposed capriciously or in a freakish manner. Gregg v. Georgia, supra; Proffitt v. Florida, supra, and Collins v. State, supra. Meaningful appellate review encompasses not only a determination of whether the evidence supports the jury's finding of a statutory aggravating circumstance, but also giving a clear and narrow construction to those aggravating circumstances to avoid overly broad or differing interpretations of them which could lead to dissimilar results. Id. It was made clear in Godfrey v. Georgia, supra, that the failure of an appellate court to take its review responsibilities seriously can result in a death penalty system with standards so vague that they fail to adequately channel the sentencing decision patterns

of juries to the end that a pattern of arbitrary and capricious sentencing could occur.

This is illustrated by the case at bar. Here the Arkansas Supreme Court has affirmed a sentence of death based upon no more than a finding that twelve average citizens, untrained in the law and uninstructed concerning the meaning of any of the aggravating circumstances, could sincerely and honestly have made the finding they did based upon their undisclosed understanding of what the particular statutory circumstances meant. The jury's interpretation of what the statutory aggravating circumstances mean can only be the subject of sheer speculation, Godfrey v. Georgia, supra, and there is no way to determine what construction a jury actually gave a statutory aggravating circumstance.

There is no restraint on the arbitrary and capricious infliction of the death sentence where an appellate court acquiesces to a jury's undisclosed interpretation of what a statutory aggravating circumstance means and accepts a verdict not supported by substantial evidence. To sustain a verdict merely because the jury made a sincere effort to answer an interrogatory as it understood it is not responsible, even if the reviewing court can understand what they meant, particularly when the court has interpreted the interrogatory differently. As appropriately stated by the Chief Justice, "A jury's answer to a question 'as it understood it' is certainly 'decisive but unreasoned,' if its understanding was wrong." (Appendix B, p. 7) It is crucial to the defendant and the community "that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

Unlike the situation in Godfrey v. Georgia, supra, here the validity of petitioner's death sentence turns not on whether the Arkansas Supreme Court can be said to have applied a constitutional construction to the statutory aggravating circumstances involved; but on the more serious issue of whether twelve average citizens, untrained in the law, applied a consti-

tutional construction to those circumstances or can even be allowed to make that binding construction. There is no principled way to determine precisely what that construction was, much less that it was constitutional. Further, there is no assurance that twelve different citizens, equally untrained in the law, would sincerely and honestly make the same finding, according to their understanding of what the aggravating circumstances meant.

Meaningful appellate review is a necessary safeguard to ensure against arbitrary and capricious imposition of the penalty of death. Gregg v. Georgia, supra; Proffitt v. Florida, supra; and Collins v. State, supra. It is required because even under carefully and narrowly drawn statutes such as those here involved, there is always a possibility for capriciousness in a jury's imposition of the penalty of death. An appellate court must take its review responsibilities seriously by clearly and narrowly defining the meaning of the statutory aggravating circumstances and reviewing the record to determine if the jury's finding of an aggravating circumstance, as properly construed by that court, is supported by substantial evidence. Otherwise, there can be no principled way to distinguish the few cases in which the death penalty is imposed from the many cases in which it is not.

Here the Arkansas Supreme Court departed from its previously announced standard of meaningful appellate review. Collins v. State, supra. By deferring to the jury's undisclosed interpretation of the meaning of the statutory aggravating circumstances rather than adhering to its own previous, narrow construction of the aggravating circumstances here involved, the Arkansas Supreme Court has approved a procedure whereby the very standards which are supposed to guide the jury's sentencing discretion and provide the means for rational appellate review are given their construction by that same jury. Under this scheme meaningful appellate review of the jury's sentencing process is impossible, if not non-existent, because the standards necessary for that

review are subject to the varying interpretations of twelve average citizens, not trained in the law, who are called to serve in a given case. By affirming a jury's finding on less than substantial evidence by deferring to the jury's unguided interpretation of the law, the Supreme Court of Arkansas has effectively adopted not only an unreviewable and overly broad construction of the aggravating circumstances here involved, but a construction which rests solely upon the unpredictable and varying understanding of any group of twelve average citizens, not trained in the law. As a result, the Arkansas death penalty system suffers from standards so vague and undefined as to render it violative of the Eighth and Fourteenth Amendments. Such a system fails to adequately channel the sentencing decision patterns of juries with the alarming effect that arbitrary and capricious sentencing could occur without the safeguard or restraint of meaningful appellate review.

A majority of this Court has declined to declare the penalty of death per se unconstitutional under the Eighth Amendment; however, the Court has emphasized in all the cases before it that due to the uniqueness of the death penalty, states must adopt and apply procedures at trial and on appeal that insure that capital punishment statutes are administered in an even-handed fashion. As applied in this case, the Arkansas death penalty scheme is insufficient and fails to provide the required safeguard against arbitrary and capricious imposition of the penalty of death.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arkansas.

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EDDIE LEE MILLER, Petitioner,

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STATE OF ARKANSAS, Respondent.

APPENDIX A

SUPREME COURT OF ARKANSAS

No. CR 79-80

Eddie Lee Miller . . . . . Appellant

vs.

State of Arkansas . . . . . Appellee

Opinion Delivered OCT 6 1980

Appeal from Crittenden County Circuit Court
Hon. Gerald Pearson, Judge

Rehearing denied.
Substituted opinion on rehearing

Affirmed.

JOHN F. STROUD, Associate Justice

Appellant was convicted of capital murder in the robbery and killing on November 3, 1978, of W. F. Bolin, a Blytheville shopkeeper, and sentenced to death by electrocution. Alleging numerous constitutional and procedural irregularities as points for reversal, appellant brings this appeal. Finding no error, we affirm the conviction and the sentence of the jury.

POINT I
THE COURT ERRED IN FAILURE TO GRANT APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED UNDER THE AUTHORITY OF A SEARCH WARRANT.

Appellant contends there was not probable cause to justify the issuance of the search warrant and any evidence seized pursuant to it should have been suppressed. The Blytheville Chief of Police, R. J. Cox, contacted Judge A. S. Harrison in Jonesboro during the evening of November 3 and presented the judge with his affidavit and testimony tending to support the issuance of the search warrant for the home and automobile of appellant. Appellant had been arrested earlier that day pursuant to an arrest warrant, the validity of which was not challenged by appellant. When the officers went to appellant's house shortly after the killing with a warrant for his arrest, they were unable to gain entrance. Appellant's wife was next door and she finally admitted that appellant was in the house but she said her keys were locked up in the house. As the officers were unable to elicit a response from appellant, they forced open the front

door. Appellant was hiding in the attic, but he came down and was taken into custody. Chief of Police Cox stated in his affidavit for a search warrant that the circumstances led him to believe that appellant had concealed the murder weapon and money in the attic where he had been hiding immediately prior to his arrest. The affidavit recited the robbery and murder of W. F. Bolin earlier that day, the forced entry of the residence pursuant to the arrest warrant, the surrender of appellant from the attic without an officer making entry into the attic, and the discovery of a sawed-off shotgun in plain view in the house. Appellant argues that the affidavit contains conclusions of the police chief rather than facts upon which the judge could make an independent determination of reasonableness. An affidavit for a search warrant must contain affirmative allegations of fact, not mere affirmations of suspicion, from which the judge may independently decide for himself whether there is probable cause for the search. Ferguson v. State, 249 Ark. 38, 458 S.W.2d 383 (1970). The judge must not merely accept without question the conclusions of the officer. Walton & Fuller v. State, 245 Ark. 84, 431 S.W.2d 462 (1968). But the affidavits in search warrants must be tested and interpreted by courts in a commonsense and realistic fashion. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); Cary v. State, 259 Ark. 510, 534 S.W.2d 230 (1976).

Both Chief of Police Cox and Judge Harrison were entitled to rely on the validity of the warrant of arrest, as the warrant was valid on its face and the attorney for appellant did not challenge its validity. We also find that Judge Harrison had sufficient information from the affidavit and sworn testimony upon which to base his finding that there was reasonable cause to believe the evidence sought would be found in appellant's house or automobile. Appellant urges that the search warrant was illegally issued because Judge Harrison considered information other than that contained in the affidavit and sworn testimony. However, a reading of the transcript clearly indicates

although he did receive other information concerning the urgent need for a nighttime search, his determination of probable cause for issuance of the search warrant was based only on the affidavit and the sworn testimony.

Appellant also contends that the warrant should not have been issued for nighttime hours. Rule 13.2(c) of the Arkansas Rules of Criminal Procedure provides that search warrants shall be executed between 6:00 a.m. and 8:00 p.m. except for stated exceptions. One of the exceptions is when the objects to be seized are in danger of imminent removal. Rule 13.2(c)(ii). The officers were so concerned, following the arrest of appellant, that his wife would dispose of the murder weapon and hide the stolen money that they left officers at the home for several hours awaiting the search warrant. Inasmuch as the officers would likely have been justified in searching the attic incident to the arrest without a search warrant pursuant to Rule 12.5, we think they demonstrated commendable restraint in deferring the attic search until the search warrant issued. There was ample evidence of imminent removal of the objects of the search to warrant Judge Harrison to authorize a nighttime search. It is also rather ridiculous to suggest that the officers should have continued to watch the entrance to the attic until 6:00 a.m. so a daylight search could be made.

POINT II

THE TRIAL COURT ERRED IN NOT EXCLUDING STATEMENTS ALLEGED TO HAVE BEEN OBTAINED FROM APPELLANT AFTER CONFRONTATION WITH EVIDENCE OBTAINED BY AN UNLAWFUL SEARCH AND SEIZURE.

Appellant bases this argument solely on the "fruit of the poisonous tree" doctrine set out in Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), where evidence obtained as a result of earlier unlawful acts was held to be "tainted" by the previous illegality and, therefore, inadmissible. However, as we have previously upheld the search of appellant's house, this argument must fall. Since the tree was not "poisonous," neither was the fruit.

POINT III

THE COURT ERRED IN NOT SUSTAINING THE OBJECTION TO THE ARGUMENT OF THE DEPUTY PROSECUTING ATTORNEY IN THE CLOSING OF THE PENALTY STAGE OF THE APPELLANT'S TRIAL.

Appellant's point for error is due to the following argument of the Deputy Prosecuting Attorney in the closing of the penalty stage of appellant's trial:

> I don't think that you can lay down at night, sleep knowing that you have allowed this man to live with the possibility of escaping again. He has already escaped once. He is an escapist.
>
> Ladies and gentlemen, I don't mean to create fear in you, but if you did do that, sentence him to life imprisonment with his having escaped once already and plan on holding him in any institution, I don't care what kind of institution it is, any institution for forty years or better, you are taking a terrific risk.

Appellant's counsel did not request the court to admonish the jury concerning these remarks. He did move for a mistrial based on them, but this motion was denied by the trial court. Appellant contends that the only logical inference that can be drawn from the statements is that the deputy prosecutor was telling the members of the jury that their lives would be in danger unless they sentenced appellant to death. However, the deputy prosecutor went on to explain that he was interrupted and that he was about to explain that the risk would be to members of society in general, not to the members of the jury. The trial court accepted this explanation, and, as noted, denied appellant's motion for mistrial. We will not reverse the action of the trial court in matters pertaining to its controlling, supervising, and determining the propriety of the arguments of counsel in the absence of manifest gross abuse. Rowland v. State, 263 Ark. 77, 562 S.W.2d 590 (1978); Perry v. State, 255 Ark. 378, 500 S.W.2d 387 (1973).

Had appellant's counsel requested the court to admonish the jury, the question of refusal would have been presented, but the failure to give an admonitory instruction is not prejudicial error in the absence of a request. Petron v. State, 252 Ark. 945, 481 S.W.2d 722 (1972); Clark v. State, 246 Ark. 1151, 442 S.W.2d 225 (1969). Prior to the closing arguments, the

court had given the jury an instruction that "closing arguments of the attorney are not evidence" and that "remarks of attorneys having no basis in the evidence should be disregarded by you." We find no abuse of discretion by the trial court in denying appellant's motion for a mistrial. A mistrial is an extreme and drastic remedy which should be resorted to only when there has been an error so prejudicial that justice could not be served by continuing the trial. Limber v. State, 264 Ark. 479, 572 S.W.2d 402 (1978); Holmes v. State, 262 Ark. 683, 561 S.W.2d 56 (1978).

POINT IV

THE COURT ERRED IN ALLOWING THE JUDGMENTS OF CONVICTION REFLECTING A NON EXISTING CRIME AT THE TIME OF THE OCCURRENCE TO BE INTRODUCED BY THE STATE AS AGGRAVATING CIRCUMSTANCES.

In 1971 appellant had pleaded guilty to several charges of "armed robbery" and these convictions were brought out by the State on cross-examination of appellant, who freely admitted the convictions. Appellant now asserts that since there was no crime technically labeled "armed robbery" when he pleaded guilty to those charges in 1971, the State should not be able to introduce the judgments of conviction as aggravating circumstances in the penalty stage of the present case. Also, appellant maintains that since the convictions were brought out during the guilt/innocence phase of his trial, they should not be brought out again in the penalty phase because this would be cumulative and repetitious and solely for the purpose of inflaming the jury. Appellant is mistaken on both of these contentions. The time to challenge the technical accuracy of the judgments of conviction for "armed robbery" would have been in 1971, not in 1978. It is also difficult to imagine that appellant would have pled guilty to "armed robbery" if he had not used a weapon during the perpetration of the robbery. Further, the fact that appellant had previously admitted the convictions on cross-examination removed any possible prejudice from the State's later introduction of them during the penalty phase of the trial.

POINT V

THE TRIAL COURT ERRED IN DISMISSING CERTAIN VENIREMEN AS PROSPECTIVE JURORS BECAUSE OF THEIR ATTITUDE TOWARD CAPITAL PUNISHMENT.

Appellant contends that several prospective jurors who had general objections to the death penalty were wrongly excluded from the jury in violation of the rule laid down in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). That rule provides, in essence, that unless a prospective juror clearly states that he would automatically vote against the imposition of the death penalty, regardless of the evidence adduced during the trial, he cannot be excused from the jury for cause.

It is no easy task for the trial court to ascertain which jurors are irrevocably opposed to the death penalty and which merely have religious or conscientious scruples in opposition to it. There are no magic words. It is not the phrasing of the questions or answers used in this area that is important; rather, it is the basic viewpoint of each juror on the possible imposition of the death penalty that is critical. The trial court must ascertain that each member of the jury will be open-minded at the outset of the trial and able to consider all the alternatives authorized by law. After reviewing the record of the voir dire of those prospective jurors excused due to their opposition to the death penalty, we are satisfied that these jurors were so irrevocably opposed to capital punishment that the trial court was not wrong in excluding them for that reason.

Appellant next contends that the "death qualification" of a juror is unconstitutional in that it results in a jury which is biased in favor of the prosecution, thus violating the Sixth and Fourteenth Amendments to the United States Constitution. As no proffer of evidence was made to support this contention, we think the treatment of this same contention was appropriately answered in Witherspoon v. Illinois, supra:

> We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.

Appellant also contends that he was denied a fair trial due to the exclusion of many prospective jurors who were black. Appellant points out that of the 31 blacks on the jury panel, 28 were excluded for one reason or another. He urges that this fact clearly indicates that blacks were systematically excluded from the jury. Ten blacks were struck by the State in the exercise of its peremptory challenges, but it is interesting to note that appellant exercised all of his peremptory challenges to strike potential white jurors. The other blacks excluded were either excused by the court or challenged for cause. Eventually, a jury of nine whites and three blacks was seated and heard the case. There is no evidence here that any class of persons was deliberately and systematically excluded from the jury panel. Although appellant severely criticizes the use of the peremptory challenges by the prosecuting attorney, we have previously held that the mere fact that the state challenged all the blacks on the jury panel does not constitute a showing that his constitutional rights were violated. Rogers v. State, 257 Ark. 144, 515 S.W.2d 79 (1974). The trial court has broad discretion in the conduct of a trial. We find no error on the part of the trial court in its supervision of the jury selection and no violation of appellant's constitutional rights in the make-up of that jury.

POINT VI

IT IS A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO LEAVE THE ABSOLUTE DISCRETION IN THE PROSECUTING ATTORNEY TO DECIDE WHO TO FILE CAPITAL MURDER CHARGES ON AND WHETHER OR NOT TO WAIVE THE DEATH PENALTY AFTER GUILT--INNOCENCE STAGE IS CONCLUDED.

Appellant contends that leaving absolute discretion in the prosecuting attorney to file capital murder charges is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. We summarily rejected this argument, or one very similar to it, in Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977), cert. den. 434 U.S. 894 (1977). The United States Supreme Court has expressed its position on

this question on several occasions. We think the following statement, in Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604, 6 (1978), is sufficiently clear on this question:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'

POINT VII

THERE WAS AN UNCONSTITUTIONAL EXCLUSION OF VENIREMEN FROM THE JURY PANEL.

Appellant alleges that the trial court erred in excusing several veniremen from jury service at the outset of voir dire. After reviewing the reasons expressed by the 24 persons excused, we find no abuse of discretion by the trial court. There was no deliberate exclusion of a large class of eligible jurors as was true in Hall v. State, 259 Ark. 815, 537 S.W.2d 155 (1976), where all farmers were excused. Here the court acted reasonably to excuse persons only "when the state of his health or that of his family reasonably requires his absence; or when, for any reason, his own interests or those of the public will, in the opinion of the Court be materially injured by his attendance." Ark. Stat. Ann. § 39-107 (Supp.197

POINT VIII

ARKANSAS CAPITAL MURDER STATUTES ARE UNCONSTITUTIONAL AS VIOLATIVE OF APPELLANT'S RIGHTS UNDER EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 2, SEC. 9, OF THE CONSTITUTION OF ARKANSAS.

We have repeatedly rejected this same argument and upheld the constitutionality of our capital murder statutes. Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979); Pickens v. State, 261 Ark. 756, 551 S.W.2d 212 (1977), cert. den. 435 U.S. 909 (1978); Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), cert. den. 429 U.S. 808 (1977). Accordingly, we find no merit to appellant's contentions.

POINT IX
PROPER LAW AND PROCEDURE WAS NOT FOLLOWED IN THE PENALTY STAGE OF APPELLANT'S TRIAL.

Appellant contends that the penalty phase of his trial was not properly conducted pursuant to Ark. Stat. Ann. § 41-1301 - 1304 (Repl. 1977. The first of these statutes provides for a bifurcated trial of persons charged with capital murder. If the defendant is found guilty of capital murder, the same jury sits again to hear additional evidence of aggravating and mitigating circumstances before determining sentence. Ark. Stat. Ann. § 41-1303 sets out seven possible aggravating circumstances to be considered by the jury and § 41-1304 enumerates six possible mitigating circumstances. Members of the jury were provided a form to indicate their findings in regard to each of the possible aggravating circumstances and a separate form for the mitigating circumstances. They found four of the seven statutory aggravating circumstances applicable to the appellant in this case:

> I. The defendant had, beyond a reasonable doubt, previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.
>
> II. The defendant did, beyond a reasonable doubt, in the commission of the capital felony murder knowingly create a great risk of death to a person other than the victim.
>
> III. The defendant did, beyond a reasonable doubt, commit the capital felony murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody.
>
> IV. The defendant did, beyond a reasonable doubt, commit the capital felony murder for pecuniary gain.

The aggravating and mitigating circumstances to be considered by the jury in all applicable cases are set out in the statute, and are therefore not worded or tailored to fit the particular facts of the case just tried. As the statute does not indicate otherwise, the circuit judges of the state have been submitting to the jury in capital murder cases all seven of the enumerated aggravating circumstances and all six of the enumerated mitigatin circumstances, regardless of the inapplicability of some of them.

Ark. Stat. Ann. § 41-1303 (Repl. 1977). The practice was perhaps also bolstered by our Committee on Criminal Jury Instructions, because none of the aggravating or mitigating circumstances are bracketed in the model instruction, to indicate they might be omitted. We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence, and we take this opportunity to direct the circuit judges of Arkansas to hereafter follow this alternate procedure. If there is any evidence of the aggravating or mitigating circumstance, however slight, the matter should be submitted to the jury. Of course, counsel may object to the determination of the trial court the same as they may object to any other form of verdict.

In this case, there were in the jury room twelve average citizens, not trained in the law, who were required to say whether or not each of seven rigidly described aggravating circumstances existed. The jurors answered the questions, unanimously, as best they could. One of the reasons these statutes were enacted was to give this court an insight to the thought processes of the jury so that we can compare the circumstances of cases involving the death sentence in our effort to avoid any arbitrary and unconstitutional application of the sentence. We do not consider the jury's findings as separate little verdicts, and we do not require the same degree of proof to sustain a jury finding that an aggravating/mitigating circumstance exists as we would require to sustain a conviction if that circumstance was a separate crime.

It is a matter of judgment whether the facts support the findings of the jury of aggravating and mitigating circumstances, but we will not substitute our judgment for the judgment of the jury that heard the evidence if there is a reasonable and understandable application of the facts to the statutory circumstances. The basic issue is whether, on the evidence, the jurors could sincerely and honestly have made the finding as <u>they</u> understood

the question. If their answer to a question had been wholly arbitrary, a different problem would confront us. But here their answers were not arbitrary. We have before us a record of all the evidence presented to the jur to help us decide whether this jury acted capriciously in imposing the death sentence. We can put ourselves in the jurors' position and understan what they meant by answering the interrogatories as they did. That we migh have interpreted an interrogatory differently does not require us to set aside a death sentence that was deliberately and conscientiously agreed upo by the persons who had the advantage of hearing the testimony as it was given.

Appellant's objection to the first aggravating circumstance found by the jury was covered in appellant's Point IV and we, therefore, here cover only the other three findings. The testimony relevant to a finding that appellant knowingly created a great risk of death to a person other than th victim was the testimony of Jim Hudson. Mr. Hudson, whose business was nex to that of the deceased, testified that after hearing several shots and his neighbor's voice say "No, no!" followed by more shots, he entered the victim's premises and came face to face with appellant. He testified appellant said, "You get in here," but instead he backed out of the door ar stood outside hiding and shaking until he saw appellant exit with a gun in his hand and run up the alley. The jury could reasonably have found on sub stantial evidence that appellant knowingly created a great risk of death to Mr. Hudson when he tried to get him inside the store. Having just murdered one man, it is not difficult to believe that appellant would have just as easily dispatched of Mr. Hudson to avoid leaving a witness to identify him

The evidence presented on the question of whether or not appellant killed the deceased for the purpose of avoiding arrest primarily consists of certain relevant portions of his confession. It is obvious from the jury's finding that they believed appellant shot Bolin to remove him as a possible witness. They did not interpret the aggravating circumstance to be applicable only to capital felony murder committed by a defendant while

he is attempting to escape from custody -- an interpretation we cannot say is erroneous. Appellant stated that, immediately prior to the shooting, thoughts of being identified by the deceased ran through his mind. Although the remainder of this passage is somewhat hard to follow, it is inescapable that appellant was concerned about being identified by the deceased. Appellant stated in his confession that the deceased reached for an iron pipe and that was why he shot him, but investigation at the scene uncovered no iron pipe or any similar object. The jury could also take into consideration the lack of any other logical reason for the killing, such as revenge or accident. Once again, we think there was sufficient evidence for the jury to find beyond a reasonable doubt that appellant killed the deceased to eliminate a witness and thus hopefully avoid arrest for the robbery.

Appellant also contends that the jury's finding that appellant committed the murder for pecuniary gain was unsupported by the evidence. This contention merits little comment. Suffice it to say that there was more than sufficient evidence to support the jury's finding that one of the reasons appellant killed the deceased was to rob the store's cash register. We have previously held that this aggravating circumstance is not limited to a killing for hire, but is also clearly applicable to a murder committed during a robbery. Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977).

The jury found none of the statutory mitigating circumstances to be applicable to appellant and, although the form indicated the jury could write in any other mitigating circumstances, they found none to exist. Appellant contends that the jury erred in not finding two of the statutory circumstances to be applicable:

> I. The capital felony murder was committed while the defendant was under extreme mental or emotional disturbance.
>
> II. The capital felony murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, intoxication, or drug abuse.

Appellant bases this contention on the report of the psychologist who evaluated him at the Arkansas State Hospital, which stated:

> . . .I conclude that Mr. Miller is not psychotic but is with serious emotional problems. I see his emotional problems in no way diminishing his competency to stand trial.
>
> . . .My clinical interview and testing indicates that he is functioning at least in the borderline range of intelligence. Moreover, he is without organic dysfunction. There are indications that Mr. Miller has significant emotional problems, but no indication that these in any way interfere with his competency to stand trial. In my opinion, these test results are consistent with a diagnosis of an anti-social personality.

It is not strange that a person charged with capital murder would have a serious emotional problem, but there was no evidence that appellant was under an extreme mental or emotional disturbance at the time of the murder. There was also no evidence that appellant was under the influence of alcohol or drugs at the time of the murder, and the report clearly indicates that appellant was capable of appreciating the wrongfulness of his conduct and conforming that conduct to the requirements of the law. The jury were free to give the report the degree of credibility and persuasiveness they felt appropriate, and they had the opportunity to observe appellant throughout the trial and to hear his testimony and taped confession. We find no error in the jury's finding that none of the statutory mitigating circumstances were applicable to appellant.

Appellant also contends that the trial court erred in requiring the jury to list in writing any additional mitigating circumstances it might find. This contention is wholly without merit. The provision on the form for the listing of any additional mitigating circumstances was included as an added safeguard to defendants so that juries would not be limited in their consideration of circumstances that might call for leniency in sentencing. The latitude of a jury to list other mitigating circumstances in writing on the form is a benefit to a defendant and certainly not prejudicial. We find no error in the application of the law or in the procedures followed during the penalty stage of appellant's trial.

Finally, as required by Ark. Stat. Ann. § 43-2725 (Repl. 1977) and Rule 11(f) of the Rules of the Arkansas Supreme Court, we have reviewed the entire record for other reversible errors and, finding none, affirm the verdict and sentence of the jury.

Judgment affirmed.

Fogleman, C.J., Purtle and Mays, JJ., dissent.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

EDDIE LEE MILLER, Petitioner,

V.

STATE OF ARKANSAS, Respondent.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. CR 79-80

EDDIE LEE MILLER, APPELLANT V. STATE OF ARKANSAS, APPELLEE	Opinion Delivered OCT 6 1980 APPEAL FROM CRITTENDEN CIRCUIT COURT GERALD PEARSON, Judge DISSENTING OPINION ON REHEARING

JOHN A. FOGLEMAN, Chief Justice

Upon further extensive review of the record in this case, I must agree with my Brother Purtle that the evidence was not sufficient to support a finding that Miller knowingly created a great risk of death to a person other than the victim, Bolin. A jury could not have found this circumstance to exist without gross speculation. Giving the evidence on this circumstance its strongest probative force when viewed in the light most favorable to the state, it could not be classified as more than a scintilla. In addition to the facts related in Justice Purtle's dissent, the only evidence the jury might possibly have considered to support this finding was Hudson's testimony that, when he was first confronted by Miller, who was holding the cash box in both hands and carrying it like it was a heavy object, Miller made a move and commanded, "You get in here." Hudson demonstrated the move for the jury in a manner not disclosed by the record. Hudson never saw a weapon until Miller had come out the side door and had gone down the street toward an alley, moving away from Hudson at all times. Perhaps the move Miller made when holding the box was justifiably interpreted by Hudson as an indication that Miller was reaching for a concealed weapon. Still, the requirements of this particular

aggravating circumstance are not met by a showing that the accused knowingly created a great fear of death by a person other than the victim; instead, Miller must have knowingly created a great risk of death to a person other than Bolin, i.e., Hudson. There is not the slightest indication that when Miller came out the side door that he ever saw, or even looked toward, Hudson. The only evidence in the case indicates that the gun Hudson saw Miller put in his belt was empty. In his incriminating statement, which was introduced in evidence, Miller said that the only four cartridges in the weapon were fired at Bolin before Hudson appeared. But even if an inference could be drawn that the weapon was loaded, there was no evidence that any effort to use it on Hudson was ever made by Miller. However favorably toward the state the jury viewed it, this evidence was not substantial to support a finding that Miller knowingly created a great risk of death to Hudson.

I cannot accept the approach of the majority in its substituted opinion that somehow we should not require the same test for substantial evidence to sustain a jury finding of an aggravating circumstance, on which the infliction of the death penalty may hinge, just because 12 average citizens, untrained in the law, perhaps confused by the submission of an aggravating circumstance for which there was no basis, did the best they could but still "deliberately and conscientiously" agreed upon a wrong answer in making a sincere and honest finding "as they understood it." The position taken by the majority to treat the jury's finding of the existence of an aggravating circumstance as something other than a "separate little verdict", which may be supported by evidence less than substantial according to the usual tests, simply does not satisfy the requirements for a constitutionally imposed death penalty.

The test for substantial evidence is not met by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences; it must be of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion, one way or another; it must force or induce the mind to pass beyond a suspicion or conjecture. Jones v. State, 269 Ark. _____ (27 May 1980). "Any" evidence is not substantial evidence; substantial evidence is valid, legal and persuasive evidence and it must do more than create a suspicion of the fact to be established. Pickens-Bond Construction Co. v. Case, 266 Ark. 323, 584 S.W. 2d 21.

I submit that the majority has not used the test for substantial evidence. How certain and precise is evidence, which does not compel a conclusion, but merely permits an appellate court to say that the "issue is whether, on the evidence the jurors could have sincerely and honestly have made the finding as they understood the question" or to test for substantial evidence by putting its members in the jurors' position (as they understood it?) and understanding what the jury meant by answering this interrogatory as it did? If the majority finds the evidence to be substantial, it should demonstrate how it meets the test without resort to the extenuatory explanations given.

The basic concern expressed by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972) centered on defendants being condemned to death capriciously and arbitrarily. Collins v. State, 261 Ark. 195, 548 S.W. 2d 106, cert. den. 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158, reh. den. 434 U.S. 977, 98 S.Ct. 540, 54 L.Ed. 2d 471 (1977). See also, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944; Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed. 2d 974 (1976).

We clearly recognized in Collins that a trial judge should impose life imprisonment without parole for a capital felony murder, "if he found that there was not sufficient evidence to support the jury's finding on any aggravating circumstance enumerated in § 41-4711,[1] and that there was not sufficient evidence to support its finding that sufficient aggravating circumstances existed or that there were not sufficient mitigating circumstances to outweigh the aggravating circumstances, but there was sufficient evidence to support the finding of guilt." [Emphasis mine.] We also said in Collins, in reference to this court's power to reduce a sentence in death penalty cases, that "[t]here is a vast difference in reviewing a sentence for error (including error resulting from insufficient evidentiary support) in the sentencing procedure and reviewing a sentence resulting from a proper and legal sentencing procedure where sufficiency of evidence is not a basis for review." In Collins, we emphasized the importance of the

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[1] This was the controlling statute at the time of the Collins trial. The present corresponding statute is Ark.Stat.Ann. § 41-1303 (Repl. 1977).

jury's findings on aggravated circumstances, in imposing a death penalty which will pass constitutional examination and in avoiding arbitrary, capricious or freakish imposition of this extreme penalty. We said:

> *** If a guilty verdict is returned, the same jury in the sentencing phase of a bifurcated trial may then hear testimony tending to show one or more specifically enumerated groups of aggravating circumstances plus evidence relevant to mitigating circumstances; but the death penalty cannot be imposed unless the jury unanimously finds, beyond a reasonable doubt, that one or more aggravating circumstance[s] exist (specifying in writing which of them does) and finds that aggravating circumstances outweigh any mitigating circumstances found to exist. ***

In pointing out that there was a meaningful appellate review of the imposition of a death penalty, we stated:

> There is a meaningful appellate review by this court of the appropriateness of the death penalty in a particular case, considering both the punishment and any errors on points raised in the trial court, including the sufficiency of the evidence to support any part of the jury verdict. This appellate review includes: (1) a determination whether the sentence was the result of passion, prejudice or any arbitrary factor; (2) whether the evidence supports the jury's finding of any statutory aggravating circumstances; (3) whether the evidence supports the jury's findings on the question whether mitigating circumstances outweigh aggravating ones; (4) whether the sentence is excessive. On appellate review, this court can reduce the sentence, or grant a new trial, in its discretion, if the sentence is excessive or there is error affecting the sentence only, or where there is insufficient evidentiary support for the sentence. *** [Emphasis mine.]

We recognized in Collins that there is no specific requirement that this court compare sentences, but found that "the scope of permissible review of the sentence on appeal would necessarily require that we consult prior cases as precedent for our determining whether there was error in the sentencing procedure, whether the evidence was sufficient to support any finding made by the jury, whether any of the findings was the result of passion or prejudice or any other arbitrary factor and whether there had been an abuse of the discretion of either the jury or the trial judge in imposing the sentence." [Emphasis mine.] In Collins, we concluded:

> These sentencing and review procedures certainly leave no substantial risk that the death sentence will be imposed randomly, arbitrarily, capriciously, wantonly or freakishly, and tend to promote evenhanded, rational and consistent imposition of the death penalty. ***

On the basis of this conclusion, review was denied by the United States Supreme Court at 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158. The majority has now effectively sawed off one of the legs upon which that conclusion stood and has rendered our death penalty statute's constitutionality suspect.

The importance of the scope of appellate review outlined in Collins was given emphasis in Neal v. State, 261 Ark. 336, 548 S.W. 2d 135.[1] Not only did we point out that "it will at least be as easy to review the record to see if there is sufficient evidentiary support for a jury's findings on these particularized circumstances as it is when a jury's general finding of guilt is questioned," we also pointed out that there was no necessity for a mechanism requiring a report from the trial judge and an accumulation of the records of all capital cases. The reason was that a review was meaningful when the appellate court undertook to "review a case in which a defendant is sentenced to die in the light of other decisions to determine whether the punishment was too great and taking its function to be to 'guarantee that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" [Emphasis mine.]

I ask, how is an appellate review meaningful if the appellate court does not give any significance to the fact that a jury found an aggravating circumstance for which there was no evidentiary support, or even something less than substantial evidence, as we have defined it.

[1] Cert. den. 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158, reh. den. 434 U.S. 961, 98 S.Ct. 495, 54 L.Ed. 2d 322 (1977).

Is the door not thrown open to arbitrary and capricious imposition of the death penalty? Could the majority have swallowed a verdict in which a jury had, deliberately and conscientiously, given an affirmative answer to the question whether the murder was committed for the purpose of disrupting or hindering the lawful exercise of a governmental or political function?

We say that arbitrary means "decisive but unreasoned" and that capricious is defined as "not guided by steady judgment or purpose." City of North Little Rock v. Habrle, 239 Ark. 1007, 395 S.W. 2d 751. What could be more arbitrary and capricious than finding an aggravating circumstance that did not exist? If we do not require the same degree of proof to sustain a jury verdict on an aggravating circumstance as we require for a finding of guilty, then why do we not? In what kind of position must we put ourselves to accept a verdict not supported by substantial evidence because we understand what a jury meant? Perhaps there are others, who, as I, do not understand it. We have never before upheld a jury's answer to an interrogatory when there was no substantial evidence to support it, just because the jury answered it as they understood it. A jury's answer to a question "as it understood it" is certainly "decisive but unreasoned," if its understanding was wrong.

I am well aware of the fact that appellant did not object to the instruction given on aggravating circumstances nor to the verdict form including this circumstance; however, this does not bar our review of the sufficiency of the evidence when the question has been raised on appeal. I am also aware of the potential argument that an erroneous finding as to one aggravating circumstance

should not overturn the verdict because the jury found four aggravating circumstances and no mitigating circumstance.

The flaw in this argument is that it is for the jury, and the jury alone, to impose a death sentence in the first instance, in obedience to statutory guidelines for the exercise of its discretion. It shall impose the sentence, if, but only if, it unanimously finds that aggravating circumstances justify a death sentence beyond a reasonable doubt. Ark.Stat.Ann. § 41-1302 (Repl. 1977). Even with the questioned circumstance eliminated, I agree that the evidence justified the requisite findings of the existence of aggravating circumstances and that the three aggravating circumstances supported by the evidence, would outweigh, beyond a reasonable doubt, mitigating circumstances which did not exist. But there was some reason for including the third statutory requisite that the aggravating circumstances must be found to justify a sentence of death beyond a reasonable doubt. How can this court know how much weight the jury gave a non-existent circumstance in deciding that the death penalty was justified? That decision rested entirely with the jury. It is not up to this court to say that because a jury could have reached its conclusion on the basis of three, rather than four, aggravating circumstances that it necessarily did.

The state's taking of a human life is a serious matter. This is the reason that we have come to the point where we impose elaborate safeguards to make sure that it is done only in strictly limited types of situations. The mere fact that an appellate court can read a record and say that it thinks a death penalty was justified in a particular case is not an adequate safeguard, any more than the exercise of standardless discretion by a jury, which is primarily the conscience of the community. The courts can only afford protection against a jury's arbitrary or capricious

action. There is no way that this court on appellate review of other death penalty cases can properly classify this case in determining whether another death penalty was properly imposed.

I am compelled to register a respectful dissent. Since I find error in the sentencing procedure, I would correct it by reducing the punishment to life imprisonment without parole, unless the state should elect to seek a retrial, in which event, I would reverse the judgment and remand the case for a new trial.

IN THE
SUPREME COURT OF THE UNITED STATES

RECEIVED
DEC 29 1980
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SUPREME COURT, U.S.

October Term, 1980

No. 80-5969

EDDIE LEE MILLER, Petitioner,

V.

STATE OF ARKANSAS, Respondent.

APPENDIX C

SUPREME COURT OF ARKANSAS

No. CR 79-80

Opinion Delivered OCT 6 1980

EDDIE LEE MILLER,

APPELLANT,

V.

STATE OF ARKANSAS,

APPELLEE.

DISSENTING OPINION

JOHN I. PURTLE, Associate Justice

I dissent only from that portion of the opinion which covers Point IX in appellant's appeal. This point covers the aggravating circumstances. I agree that aggravating circumstances one and four as found by the jury were proper. However, I do not agree that the evidence supports finding aggravating circumstances two and three.

I will first discuss aggravating circumstance number two which the jury found to exist. The jury answered yes to the following:

> The defendant did, beyond a reasonable doubt, in the commission of the capital felony murder knowingly create a great risk of death to a person other than the victim.

This finding was based upon the theory that the appellant created a great risk of death to the witness, Jim Hudson. Jim Hudson testified that he heard the shots next door and went over to investigate. He stated:

> ...In fact, I got in the door, had the door pushed open and then right in my face was a black guy and he had a metal box in his hand. Both hands were just carrying it in front of him like this. He was carrying it just like it was a heavy box or something but that is the way he was carrying it. Yes, I am indicating that his fingers were underneath the object and his thumbs encircling the top. ... I recognized that as being his money box. ... He turned away from toward the police station, well he had the gun or he had a gun in his hand. It was

> more down to his side. He was glancing from side to side as he went toward the alley. I would say approximately half way between the door that he came out of in the alley, he then stuck the gun in front, apparently in his belt or in his clothing. And then he run. And he turned up the alley. ...

This is the only possible evidence upon which the jury could have found the appellant created a great risk of death to a person other than the victim, and it prevents me from agreeing that this was a proper finding of an aggravating circumstance. When the witness encountered the appellant, both hands were holding a box in front of him. The witness backed out of the building; and, when he next saw the appellant, he was leaving the scene of the crime. When he saw the appellant leaving the scene, the gun was in his hand down by his side, and then it was placed inside the front of his belt or in his clothing. The appellant ran away.

At no time was the gun aimed at the witness nor were any shots fired which could have conceivably struck this witness or any other person. Therefore, I simply cannot see that there is enough evidence to support this finding of an aggravating circumstance.

The second finding of aggravating circumstance which I disagree with was:

> The defendant did, beyond a reasonable doubt, commit the capital felony murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody.

By no stretch of my imagination can I believe that the victim was killed for any purpose other than to obtain his money. The majority concludes that the appellant must have had thoughts running through his mind that he should kill the victim to keep from being identified. However, the aggravating circumstance in this case found that the killing was for the purpose of avoiding or preventing an arrest or effecting an escape from custody. Certainly, he had not been in custody and could not have been attempting to escape. It is certainly more logical

to presume that the appellant thought he would never be identified, and no thought was in his mind of preventing an arrest. It is my opinion that this aggravating circumstance is intended to cover a situation where a person is physically attempting to prevent arrest or trying to escape from custody.

In view of the erroneous findings by the jury of these two mitigating circumstances, I would reduce the sentence to life without parole and return it to the trial court giving the prosecution an option to either concur in the life without parole sentence or retry the appellant.

I am authorized to state that Mays, J., joins me in this dissent.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5369

EDDIE LEE MILLER, Petitioner,

V.

STATE OF ARKANSAS, Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Eddie Lee Miller, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the cost of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in this case.

5. Leave to proceed in forma pauperis was granted in both the trial court and Supreme Court of Arkansas.

6. The nature of this cause is briefly stated as follows:

I was convicted of capital murder and sentenced to death in the Circuit Court of Mississippi County, State of Arkansas. The judgment and sentence were appealed to the Supreme Court of Arkansas. The grounds of the appeal were, inter alia, that the sentence of death under the laws of Arkansas violates the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO EM

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. October 1978 $900. E M

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO E M

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO E M

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO E M

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. Sharon Miller - wife E M

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Executed on December 22nd, 1980, at Grady, Arkansas.

Eddie Lee Miller
Eddie Lee Miller

SUBSCRIBED and SWORN to before me this 22nd day of December, 1980.

Notary Public

MY COMMISSION EXPIRES:

My Commission Expires 9/6/82

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5969

EDDIE LEE MILLER, Petitioner,

V.

STATE OF ARKANSAS, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Eddie Lee Miller, who is now held in the Cummins Unit of the Arkansas Department of Correction, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Arkansas without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit in support of this motion is attached hereto.

E. ALVIN SCHAY
APPELLATE PUBLIC DEFENDER

BY: Ray Hartenstein
RAY HARTENSTEIN
Chief Deputy Defender
Suite 714, 1515 Building
Little Rock, AR 72202

Counsel for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5969

EDDIE LEE MILLER, PETITIONER

VS.

STATE OF ARKANSAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

STEVE CLARK
ATTORNEY GENERAL

By: C.R. McNAIR, III
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201

(501) 371-2007

ATTORNEYS FOR RESPONDENT

NO. 80-5969

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

EDDIE LEE MILLER — PETITIONER

vs.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTION PRESENTED FOR REVIEW

Whether the aggravating circumstances found in this case exist beyond a reasonable doubt and justify a sentence of death beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming petitioner's conviction is found at 270 Ark. Adv. Sh. 341, ____ S.W.2d ____ (Substitute opinion on rehearing, October 6, 1980). The opinion, in slip form, is reproduced in the appendix to the petition at A-1.

JURISDICTION

The petitioner has adequately set forth the grounds for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petitioner has adequately set forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The petitioner has adequately set forth the facts of the case.

REASONS FOR DENYING THE WRIT

1. THE AGGRAVATING CIRCUMSTANCES FOUND IN THIS CASE EXIST BEYOND A REASONABLE DOUBT AND JUSTIFY A SENTENCE OF DEATH BEYOND A REASONABLE DOUBT.

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed2d 346 (1972), this Court condemned the death penalty as applied in Georgia and by implication in other states as well, as violative of the Eighth Amendment.

> "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."

Gregg v. Georgia, 428 U.S. 153, 188 (1976).

In order that the death penalty in Arkansas might comport with the Constitution, the General Assembly enacted Act 438 of 1973. This Act set forth mandatory procedures to insure that the death penalty would not, in the words of Furman, be "freakishly or wantonly" imposed. The Act called for a bifurcated trial and enumerated the factors in aggravation and mitigation which the jury must find in writing, justifying their finding, before the death penalty could be imposed. The legislature obviously felt that by setting forth these requirements, not only would they insure that the death penalty was not "freakishly or wantonly" imposed by the jury, but also that there would be a greater opportunity for a meaningful review of the jury's findings on appeal.

The Arkansas Supreme Court held Act 438 to be constitutional in Collins v. State, 259 Ark. 9, 531 S.W.2d 13 (1975), and Neal v. State, 259 Ark. 27, 531 S.W.2d 17 (1975). In a trilogy of cases, this Court gave approval to the method of imposing the death penalty not unlike those in Arkansas. Gregg v. Georgia, supra; Proffitt v. Florida, 428 U.S. 242, 913 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

In Gregg, supra, this Court gave its approval to sentencing provisions similar to those used at petitioner's trial. 428 U.S. at 163. This Court stated the constitutional benchmark as follows:

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and

risk of wholly arbitrary and capricious action.

(Emphasis added). 428 U.S. at 189.

> To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

(Emphasis added). 428 U.S. at 192.

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

(Emphasis added). 428 U.S. at 195.

The Florida statute, also similar to the Arkansas statute, was approved in Proffitt, supra, 428 U.S. at 248. There this Court stated:

> On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must, inter alia, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, see Gregg v. Georgia, at 197, 49 L.Ed.2d 859, 96 S.Ct. 2909, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

(Emphasis added). 428 U.S. at 252. See also Jurek, supra, 428 U.S. at 267. The sentencing guidelines are required to

serve two distinct purposes, i.e. to focus jury discretion at the time of sentencing and to provide adequate appellate review of sentencing decision.

The Arkansas Supreme Court reviewed Act 438 in light of Gregg, Proffitt, and Jurek, supra, and found the Arkansas procedures to be constitutional. Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), cert. den. 434 U.S. 878 (1977); Neal v. State, 261 Ark. 336, 548 S.W.2d 135 (1977), cert. den. 434 U.S. 878 (1977).

In the present case, the exercise of the jury's discretion, in sentencing petitioner to death, fully comported with the above mentioned case law. The jury found four (4) of the seven (7) statutory aggravating circumstances to exist beyond a reasonable doubt. The jury found none of the statutory mitigating circumstances to exist; nor did the jury find any mitigating factors, in addition to those listed in the statute. The jury concluded that; one or more of the aggravating circumstances existed beyond a reasonable doubt; the aggravating circumstnaces outweighted beyond a reasonable doubt any mitigating circumstances; and the aggravating circumstances justified beyond a reasonable doubt, the sentence of death.

In the instant petition, it is argued that two of the aggravating circumstances found were not supported by the evidence and that petitioner's sentence is therefore unconstitutional.

In Miller v. State, 270 Ark. 341, (Substitute opinion on rehearing, October 6, 1980) the Supreme Court noted:

> The aggravating and mitigating circumstances to be considered by the jury in all applicable cases are set out in the statute and are therefore not worded or tailored to fit the particular facts of the case just tried. As the statute does not indicate otherwise, the circuit judges of the state have been submitting to the jury in capital murder cases all seven of the enumerated aggravating circumstances and all six of the enumerated mitigating circumstances, regardless of the inapplicability of some of them. Ark. Stat. Ann. §41-1303 (Repl. 1977). The practice was perhaps also bolstered by our Committee on Criminal Jury Instructions, because none of the aggravating or mitigating circumstances are bracketed in the model instruction, to indicate they might be omitted. We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating or mitigat-

> ing circumstances that are completely unsupported by any evidence, and we take this opportunity to direct the circuit judges of Arkansas to hereafter follow this alternate procedure. If there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury. Of course, counsel may object to the determination of the trial court the same as they may object to any other form of verdict.

(Emphasis added). 270 Ark. at 354.

Respondent therefore submits that petitioner's sentencing jury properly considered all the statutory aggravating and mitigating circumstances. Respondent further submits that there is support in the evidence at trial for all four aggravating circumstances found to exist in petitioner's case.

The aggravating circumstances found by the jury are as follows:

> I. The defendant had, beyond a reasonable doubt, previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.
>
> II. The defendant did, beyond a reasonable doubt, in the commission of the capital felony murder knowingly create a great risk of death to a person other than the victim.
>
> III. The defendant did, beyond a reasonable doubt, commit the capital felony murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody.
>
> IV. The defendant did, beyond a reasonable doubt, commit the capital felony murder for pecuniary gain.

The two aggravating circumstances allegedly unsupported by the evidence are:

> II. The defendant did, beyond a reasonable doubt, in the commission of the capital felony murder knowingly create a great risk of death to a person other than the victim.
>
> III. The defendant did, beyond a reasonable doubt, commit the capital felony murder for the purpose of avoiding or preventing an arrest or effecting an escape from custody.

There is evidence to support these findings when the evidence is viewed in the light most favorable to appellee as it must be on appeal, Ruiz & Denton v. State, 265 Ark. 875, 897, 482 S.W.2d 915 (1979); Westbrook v. State, 265 Ark. 736, 749, 580 S.W.2d 702 (1979); Neal v. State, 259 Ark. 27, 34, 531 S.W.2d 17 (1975); vacated, other

grounds, 429 U.S. 808 (1976), reinstated, 261 Ark. 336, 548 S.W.2d 135 (1977), cert. den., 434 U.S. 878 (1978), Cf. Swindler v. State, 267 Ark. 418, 434, 592 S.W.2d 91 (1979); Hulsey v. State, 261 Ark. 449, 466, 549 S.W.2d 73 (1977), cert. den., 439 U.S. 882 (1978).

Petitioner contends that the Arkansas Supreme Court approved a jury finding on less than substantial evidence that he "did, beyond a reasonable doubt, in the commission of the capital murder, knowingly create a great risk of death to a person other than the victim."

The petitioner states that there was no evidence presented to justify the jury's finding. In so stating, however, he seems to neglect to remember that in his own handwritten confession, he said that after he had shot the victim and had gotten the money, a man came to the door of the store and petitioner told him to come in. (T. 690-692, 948)

In the taped interview, petitioner spoke of the reason that he shot the victim, Mr. Bolin, four times:

> Q. And just leave him sitting there?
>
> A. And just leave him or just leave him just sitting there, you know, and by the time I got out the door I knowed he was going to call the police or something, you know, and - and I'd been, you know, gone and it been at least you know, you'd been described you know, I know I probably got described but it probably the first time he'd seen me in there. And I was just going to take my chances, you know, or just, you know, get the money and just go on, you know. (T. 688-689)

The petitioner also said that after having shot the victim, he then grabbed the cash box and as he did, a man, Mr. Hudson, came in the door. (T. 680) The petitioner seems to have also forgotten that Mr. Hudson testified that, upon hearing shots, he ran to the victim's store and opened the door. (T. 551, 552) Mr. Hudson testified that at that moment, the appellant was right there in Hudson's face holding what he knew to be victim's cash box. (T. 552, 553) Mr. Hudson than testified:

> A. And at that point the guy made a move like this (indicating) and then he said, "You get in here." Well, I backed out the door. And it was a brick building. I knew that if I got behind the door facing, the brick, then I would be safe.

So I backed out around the door. That put me between Main Street, Mr. Bolin's front door and his side door. I didn't know which (T. 553) way he was coming out so I tried to divide the distance between the front door and the back door or the side door.

Q. Were you staying up near the building?

A. I was standing close to the building. I saw some cars, two cars out on the street and I thought about getting under or getting behind one of those, but I realized that it would have put me visible from either door, the front or the side door. So I stood there shaking. And I stood there until the guy came out. He came out the side door which I went in.

Q. Now, that is the door on Second Street?

A. The door facing Second Street. And at the time that I saw him, he had already turned to go down the other way toward the alley.

Q. Turned away from you going towards the police station?

A. Away from me going towards the police station. Well, he had the gun or he had a gun in his hand. It was more down to his side. He was glancing from side to side as he went towards the alley. I would say approximately half way between the door that he came out of and the alley he then stuck the gun in front, apparently in his belt or in his clothes. And then he run. And then he turned up the alley. So I went in. (T. 554)

In considering this identical issue on direct appeal, the Arkansas Supreme Court observed that:

> The testimony relevant to a finding that appellant knowingly created a great risk of death to a person other than the victim was the testimony of Jim Hudson. Mr. Hudson, whose business was next to that of the deceased, testified that after hearing several shots and his neighbor's voice say "No, no!" followed by more shots, he entered the victim's premises and came face to face with appellant. He testified appellant said,"You get in here," but instead he backed out of the door and stood outside hiding and shaking until he saw appellant exit with a gun in his hand and run up the alley. The jury could reasonably have found on substantial evidence that appellant knowingly created a great risk of death to Mr. Hudson when he tried to get him inside the store. Having just murdered one man, it is not difficult to believe that appellant would have just as easily dispatched of Mr. Hudson to avoid leaving a witness to identify him. (Emphasis added).

Miller v. State, 270 Ark. at 355.

Petitioner also asserts that there was less than substantial evidence to support a finding "beyond a reasonable doubt that this capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody."

The relevant evidence in this regard, as noted above, was petitioner's statement that:

> "I was just intending to get the money and go...and by the time I got out the door I knowed he was going to call the police or something you know, and - and I'd been, you know, gone and it had been at least, you know, you'd been described, you know, I know I probably got described but it probably the first time he's seen me in there and I was just going to take my chances, you know, or just, you know, get the money and just go on, you know." (T. 688, 689)

There was also testimony from Mr. Hudson, the barber, that as he Hudson, retreated, he saw the appellant come out of the door, move down the alley, glancing from side to side, and finally tuck his gun in his belt. (T. 554)

On review of this contested aggravating circumstance, the Arkansas Supreme Court determined that:

> The evidence presented on the question of whether or not appellant killed the deceased for the purpose of avoiding arrest primarily consists of certain relevant portions of his confession. It is obvious from the jury's finding that they believed appellant shot Bolin to remove him as a possible witness. They did not interpret the aggravating circumstances to be applicable only to capital felony murder committed by a defendant while he is attempting to escape from custody -- an interpretation we cannot say is erroneous. Appellant stated that, immediately prior to the shooting, thoughts of being identified by the deceased ran through his mind. Although the remainder of this passage is somewhat hard to follow, it is inescapable that appellant was concerned about being identified by the deceased. Appellant stated in his confession that the deceased reached for an iron pipe and that was why he shot him, but investigation at the scene uncovered no iron pipe or any similar object. The jury could also take into consideration the lack of any other logical reason for the killing, such as revenge or accident. Once again, we think there was sufficient evidence for the jury to find beyond a reasonable doubt that appellant killed the deceased to eliminate a witness and thus hopefully avoid arrest for the robbery.

Miller v. State, 270 Ark. at 356.

In light of all of this, it is very easy to get the justification of the jury's finding there. Certainly, when the evidence is viewed in the light most favorable to the appellee, as it must be on appeal, Ruiz & Denton v. State, 265 Ark. 875, 897, (1979) 482 S.W.2d 915 (1979); Westbrook v. State, 265 Ark. 736, 749, 580 S.W.2d 702 (1979); Neal v. State, 259 Ark. 27, 34, 531 S.W.2d 17 (1975), vacated other grounds, 429 U.S. 808 (1976), reinstated, 261 Ark. 336, 548 S.W.2d 135 (1977), cert, den., 434 U.S. 878 (1978), the evidence was sufficient to support the jury's finding. Cf. Swindler v. State, 267 Ark. 418, 434, 592 S.W.2d 91 (1979); Hulsey v. State, 261 Ark. 449, 466, 549 S.W.2d 73 (1977), cert. den., 439 U.S. 882 (1978).

Each aggravating circumstance had a separate evidentiary base. Here it cannot be said that an aggravating circumstance is not established by any evidence. As this Court stated in Jackson v. Virginia 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in a criminal case, the test of substantiality must be:

> " Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Viewing all the aggravating circumstances found by the jury, as compared with the lack of mitigating circumstances, it is evidence that petitioner's death sentence was not capriciously, wantonly or freakishly imposed.

CONCLUSION

Respondent would thus submit that the aggravating circumstances found in this case exist beyond a reasonable doubt and justify a sentence of death beyond a reasonable doubt. The petition should therefore be denied.

Respectfully submitted,

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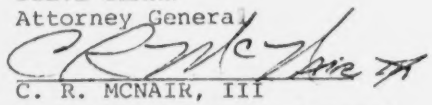
Attorney General

By: 

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